ABSOLUTE AND NON-DEROGABLE RIGHTS IN INTERNATIONAL LAW

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In international law absolute and non-derogable rights are two separate categories. However, these categories are often conflated and confused. The distinction is extremely important and has a significant impact upon how rights are interpreted and applied.

To illustrate, the right to life is not an absolute right, meaning that it is possible for the right to life to be limited in certain circumstances. For example, reasonable limitations on the right to life allow police to shoot people where this is necessary and proportionate. However, the right to life is non-derogable, which means that the right, even where limited, cannot be suspended in a state of national emergency. Thus, even in states of national emergency, police may only shoot people where it is a necessary and proportionate response.

Absolute and non-absolute rights

Under international law, some rights are absolute. Absolute rights cannot be limited in any way, at any time, for any reason. Absolute rights in the ICCPR include:

(a) the right to be free from torture and other cruel, inhuman or degrading treatment or punishment (Article 7);
(b) the right to be free from slavery and servitude (Articles 8(1) and (2));
(c) the prohibition on genocide (Article 6(3));
(d) the prohibition on prolonged arbitrary detention (elements of Article 9(1));
(e) the prohibition on imprisonment for failure to fulfil a contractual obligation (Article 11);
(f) the prohibition on the retrospective operation of criminal laws (Article 15);
(g) the right of everyone to recognition everywhere as a person before the law (Article 16); and
(h) the right to freedom from systematic racial discrimination (elements of Articles 2(1) and 26).
All other rights are non-absolute, meaning that they may be subject to such limitations or restrictions as are reasonable, necessary, proportionate and demonstrably justifiable.

**Derogable and non-derogable rights**

Derogations, on the other hand, allow states to 'suspend part of their legal obligations, and thus restrict some rights, under certain circumstances'. Derogation is used to enable a state to respond to a serious public emergency 'which threatens the life of the nation'. Any derogation must be for a limited period of time, proportionate to the emergency and non-discriminatory.

By definition, any right that is absolute is also non-derogable, meaning that it cannot be suspended even in a declared state of emergency. Additionally, the following rights are also non-derogable (and therefore must not be suspended, even in a declared state of emergency):

1. the right to life;
2. freedom from medical or scientific experimentation without consent;
3. freedom from thought, conscience and religion;
4. the right of all persons deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person;
5. some elements of the rights of persons belonging to ethnic, religious or linguistic minorities;
6. the prohibition against taking hostages, abductions or unacknowledged detention;
7. the prohibition on propaganda for war and advocacy of national, racial or religious hatred that constituted incitement to discrimination, hostility or violence;
8. the prohibition against re-introduction of the death penalty if it has been abolished.

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2. See, eg, *International Covenant on Civil and Political Rights* (ICCPR), art 4, which states 'in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.'
5. See art 4(2) of the ICCPR.
6. Ibid.
7. Ibid.
8. See HRC, *General Comment 29*, [13(a)].
9. Ibid, [13(c)].
10. Ibid, [13(b)].
11. Ibid, [13(e)].
The right to freedom religion

The right to freedom of thought, conscience, religion and belief is protected in article 18 of the ICCPR. As stated above, article 18 is non-derogable, meaning that it cannot be suspended in a state of emergency. In addition, the ICCPR does “not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice”\(^3\). This means that States must not dictate or forbid confession to or membership in a religion.\(^4\)

However, article 18(3) does permit limitations on the freedom to manifest religion or belief on the condition that such limitations “are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others”. This means that it is permissible to enact laws that prohibit polygamy, regardless of how deeply entrenched polygamy is in a person’s religion. Similarly, the ritual use of narcotic substances and child abuse may be prohibited even where the prohibition infringes upon religious belief.

Yours Sincerely

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\(^3\) See Second Optional Protocol to the ICCPR, art 6 and discussion of same in HRC. General Comment 29, [7].

\(^4\) HRC. General Comment 22: The right to freedom of thought, conscience and religion (Art. 18), UN Doc.

CCPR/C/21/Rev.1/Add.4 (1993) [3]

\(^14\) Nowak, CCPR Commentary (2005), p. 415.